



POLICE DEPARTMENT

September 11, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Alen Mariano
Tax Registry No. 944116
Police Service Area 9
Disciplinary Case No. 2011-4411

The above-named member of the Department appeared before me on February 2, 2012 and March 16, 2012, charged with the following:

1. Said Police Officer Alen Mariano, assigned to the [REDACTED] Precinct, while off-duty, on or about January 27, 2011, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer Alen Mariano, did intentionally subject an individual, identity known to the Department, to sexual contact without said individual's consent, in that said Police Officer Alen Mariano inserted his penis inside said individual's vagina without said individual's consent. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT – GENERAL REGULATIONS

The Department was represented by Javier Seymore and Nancy Slater, Esqs., Department Advocate's Office, and Respondent was represented by John Arlia, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

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DECISION

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Person A, Daniel Sosa, Police Officer Rosalia Wala, Sergeant Shantel James, and Christina Aligibakis.

Person A

Person A, a [REDACTED] resident, was employed by the New York City Department of Education as a teacher for 11 years. She holds a [REDACTED] degree in [REDACTED] [REDACTED] with a concentration on [REDACTED] [REDACTED]. She also received her reading specialist degree [REDACTED]. She has resided in [REDACTED] for three years.

She said on January 27, 2011, there was a snowstorm and she did not go to work. She spent some time shoveling the snow around her car and then went back home to warm up. She came back again to finish shoveling at approximately 6:30 p.m. and saw two men also shoveling their car behind her. The two men offered their help to Person A, at first she refused, but then accepted their help. While conversing with the two men, she learned they were both police officers, one of whom was Respondent. After a brief conversation with Respondent, Person A gave Respondent her phone number. Respondent called Person A once at approximately 7:15 or 7:30 p.m., and a second time between 8:00 and 8:30 p.m. The second phone call lasted approximately one hour and they had a

general conversation where they became familiar with one another and also decided that they were going to meet at 11:00 p.m. [on January 27, 2011], for coffee.

At approximately 11:00 or 11:30 p.m., Person A waited in the lobby of her building. Since Respondent had helped with shoveling out Person A's car, Person A believed that she was the one that was going to be driving, but instead, Respondent picked her up from her house in his white SUV. While in the SUV, she said Respondent made about two phone calls during which he asked, "who was going to be at the door to the location and also, who was there, who was at the places." Person A said she was under the impression that she was the one who was going to decide where they were going, not Respondent. She said Respondent told her that he asked those questions because "he did not want to be searched, he did not want people to know that he was a police officer," and that, "he did not want people to know that he had a gun on him."

They arrived at a "buffet-style restaurant" [Mofongo Bar] on the corner of [REDACTED]. She did not recall the full name but said it was "something Mofongo" and it had live music. She had recognized the place because she had driven past it a few times. She said the music was very loud and that she consumed one shot of alcohol and two beers and also danced "Reggaeton," a cultural dance where they danced in close proximity to each other. She had also observed Respondent texting on his cellular phone, but did not know who he was texting. She said Respondent was concerned because he thought "there were going to be more people there and he thought it was going to be a livelier place to hang out. He was concerned that I was not having a good time." She agreed that she was enjoying herself.

At approximately 1:00 a.m. Person A told Respondent that she needs to go because she had to be at work at 8:40 a.m. After leaving the bar, Respondent drove to a very dark dead-end street and parked his vehicle near a park. Person A was not aware that she was going to a park, but once arriving at the park, she did not object to being there. She was sitting in the front passenger seat of the SUV and was wearing jeans, 3/4 shirt, a sweater vest, boots and a coat. Respondent and Person A open-mouth kissed and conversed with each other and then Respondent moved to the backseat of his vehicle. Person A also agreed to move to the back seat with Respondent. She testified that they continued talking and kissing but at one point kissing became more dominant than talking and Respondent "became more aggressive with his hands. He was touching me more and he was grabbing at me more ... at first, he had his hands toward the smaller of my back and at one point, he started moving his hands under my shirt ... [and] touched my breast."

Person A moved Respondent's hand, Respondent paused for a minute and then told Person A that he wanted her to "have a good time and then he began to kiss me again." Respondent became more aggressive and began putting his hands inside Person A's shirt. Person A again pulled Respondent's hand out but Respondent again told her that he wanted her to relax and have a good time. Person A said that at this point she was not having a good time and began resisting Respondent's advances and pushed herself and Respondent back, but Respondent "continued to put his hands basically throughout my body." At one point Respondent stopped and they remained in the back seat but then Respondent's hands "were moving a lot faster and were a lot stronger than the control I had in my own hand so I tried to stop his hands from touching me and I told him to please stop."

She said that Respondent then took her hand and placed it over his exposed penis and at this point she felt afraid and not in control. She was afraid because "it was moving a lot further and faster than I had anticipated... [and] because I had already said not...because there was no one else around, there was no one to ask for help at this point." She tried pulling Respondent's hand but did not have the strength to do so. Respondent continued to kiss her and then "he put his hands inside my pants and inside my underwear and he had his hand inside me." She used both of her hands to remove Respondent's hand but it took her a while because she is not physically strong enough.

While both of Person A's hands were holding onto one of Respondent's hand while it was "inside of [her]" Respondent took his free hand and began pulling Person A's pants down. Person A had repeatedly told Respondent to stop.

Person A finally takes Respondent's hands out from inside of her pants and tried straightening herself out because she had sunk lower in the seat. She tried reaching for the handle to pull herself up but began "struggling with [Respondent] to rearrange my cloths to sit up." She was unable to sit up because Respondent was pulling her pants down and he was "laying his body on top of mine. He is forcing - - he forces himself inside, of at this point." She said she did not know how long he had forced himself inside of her but it could have been five minutes. She again told him to stop and tried finding the handle so that she could straighten herself out because she is "scared and trying to figure out a way to get out of there." She eventually finds the handle and "somehow pull myself up and I straighten myself up and I open the door and I basically jump out." She was standing outside of Respondent's vehicle with her pants below her knees and her

underwear was still on. Before Respondent penetrated her, he moved her underwear to the side.

While outside, she pulled up her pants, grabbed her jacket and walked towards [REDACTED] to a well lit area to safety and to hail a taxicab. She said it was approximately 1:30 or 2:00 a.m. and freezing with snow and ice on the ground. As she walked towards [REDACTED], Respondent drove along side her and asked her to stop walking and talk to him. Person A walked faster and did not stop until she reached a gas station.

At the gas station she found a taxicab and called her best friend, Daniel Sosa, so that she could meet him at his building because she was afraid of going home since Respondent knew where she resided. Since Respondent was near the taxicab, she did not ask the cab driver to take her to a specific address, but instead she requested to be taken to the bathroom at a nearby McDonald's restaurant. She said she was petrified and cried hysterically.

It was a two minute drive from McDonalds to Sosa's residence and she arrived there at about 2:00 a.m. where she was met by Sosa had who asked her what was wrong. She told Sosa that she went out with a police officer, had a couple of drinks and was then raped by him. She said she was not thinking about going to the hospital because she was not sure if she was safe.

While with Sosa, Person A called Sosa's sister, Police Officer Rosalia Wala, but could not clearly communicate with her because she [Person A] was crying a lot. Wala suggested that Person A go to [REDACTED] and not to go to a precinct to file a report because she [Wala] was going to call the Internal Affairs Bureau (IAB) and have them respond to the hospital.

Person A arrived at the hospital between 2:30 and 2:45 a.m. and waited for over ten hours before she was called to submit a rape kit. She said that she was in her cycle and had on a panty liner. She said that for the rape kit, she had to remove all of her clothing and the dirt from under her fingernails was also removed. She was then placed on a gurney with her legs up, "as if you are getting a G-Y-N exam." A swab was inserted inside of her and also over her body as to recover any traces of DNA.

After completing the rape kit, she was given a "cocktail 12 different pills" so as to prevent sexually transmitted diseases and unwanted pregnancy. She had to take the cocktail of pills three times a day for three months. Also after completing the rape kit, she was interviewed by IAB detectives and told them her account of the incident. She said her case was subsequently handed over to Detective Fabregas [Lieutenant Fabregas]. Respondent had called Person A when she first arrived at Sosa's residence and again when she was at the hospital. During the first phone call, Respondent tried having a conversation but there was a lot of static and the call dropped. She had placed the phone call on speaker phone because Sosa was next to her. She said the second phone call was longer but mostly because she was instructed by IAB to arrange a meeting with Respondent.

She said she placed the first phone call on speaker because Sosa had suggested it because he wanted to record the conversation between her and Respondent. She said she spoke to Fabregas at approximately 9:00 or 10:00 [a.m.]. She did not call out or go to work that day.

She said IAB and the District Attorney's [DA] office wanted to have a controlled meeting with Respondent on the same night. Her car was "wired" and IAB and the DA's office wanted Person A to talk to Respondent about why Respondent raped her.

During Person A's conversation with Respondent, Person A said he was "defensive," and when Person A asked Respondent "why did [you] do that," Respondent replied, "we got carried away ... I stopped when you said no ... I just wanted you to have a good time .." Person A told him that he did not stop when she had said no. She said that Respondent did not admit to what he did and defended his actions.

She said she was disciplined for not notifying the principal of her absence from school and received a warning letter for lack of professionalism for missing work. She said that she is one of the few teachers that live near the school and can go to work more easily during emergencies than other teachers who live farther away.

Person A testified that this incident changed her "because it showed that someone who is a complete unknown to me can take advantage and rape me in a way that he did. I don't trust people. I live across the street from a precinct so it has become increasingly hard to have to see men in uniform every day because I don't know if someone is watching me." Person A was afraid of encountering Respondent and not being able to do anything and as a result, she had to go to counseling. It was hard for her to get out of bed and hard for her to go in and out of her building and seeing an RMP posted there. She said it was hard to focus at work because "all I'm thinking about is what he did to me."

During cross examination, she agreed that there were three recorded conversations with Respondent and that one of the conversations was 45 minutes long. She said the control meeting with Respondent was approximately one half hour. The first

controlled conversation was to try and get Respondent to meet with her and during the second and third controlled meetings; Person A wanted Respondent to admit that he raped her. She said that during one of the conversations Respondent said, "he was sorry that I feel the way that I do and that what happened, happened because we both wanted it and I told him, no, I did not, I kept saying for you to stop."

She agreed that she was voluntarily "tongue kissing" with Respondent while they were parked at the [dead-end] location and that it was approximately 1:00 a.m. She said she did not recall what she was doing with her hands while kissing Respondent and also did not recall caressing Respondent's face. Person A did not mind kissing Respondent and did not ask to leave because she "was not having a bad time, I was not having a good time. It just did not matter."

She took her jacket off and said she neither saw Respondent's firearm nor did Respondent threaten her with his firearm. However, when she asked Respondent if he had his firearm, Respondent said he did. She said Respondent went to the backseat first and then asked her to join him. She said that "I didn't have expectations of what could happen. I had a clear understanding of what was not going to happen." She did not tell him that she was on her cycle because she did not feel the need to tell him that. Even after Respondent had pulled down her pants she did not tell Respondent that she was in her cycle because "I was saying stop at this point."

Person A said she went to the backseat because Respondent was there and because "we were having a conversation... at this point of the night, it was just conversation and I was not fearful... I still felt comfortable enough to go to the back seat and understood that because he was a police officer, I was safer with him than most any other places."

She acknowledged that at some point Respondent kissed and touched her breast and that she did not leave the vehicle nor tell Respondent that she wanted to go home. She added that Respondent kissed only one of her breasts.

She did not recall there being a store or stores within a one block radius of where she was parked.

She said, "I kissed the assailant. I don't think that gives him permission to go further than that."

Person A said she did not recall telling IAB that she was not sure if Respondent had penetrated her.

The following documents were stipulated into evidence: Respondent's Exhibit [RX] B is IAB's call out interview dated January 28, 2011. RX C is a tape recorded interview with Person A and Respondent. RX D is the controlled face-to-face meeting with Respondent and Person A on January 29, 2011. RX E is the face-to-face meeting on February 4, 2011 between Person A and Respondent.

Person A said it was not necessary to go to a secluded area to talk in the back seat of Respondent's vehicle.

She said she did not invite Respondent upstairs to her apartment [at the time they were shoveling the snow] because "my home is private and I only invite people that I'm comfortable knowing where I live there."

She said she did not recall saying, during one of the face-to-face meets with Respondent, that "Was it me, if it was me, I would like to know," nor did she recall saying, "Is it something I did. I need to know for the future." She also said that during one of the face-to-face meetings, Respondent had apologized for the way he made Person A

feel but that is not the apology that Person A was looking for. She said she was not calm but tried to look calm during her face-to-face meetings with Respondent.

She acknowledged that she listened to RX D for clarification and not for context, so that she could understand how to handle the second face-to-face meeting. She did not cry after Respondent left the controlled face-to-face meeting. She was not hysterical during the first controlled meeting with Respondent. Person A said she did not believe there were any conversations between her and Respondent after the February 4, 2011 controlled meeting.

Person A said she first noticed that Respondent's penis was exposed when Respondent placed her hand over it and Person A did not leave or attempt to leave the vehicle. She agreed that Respondent did not, in any way, inhibit her from leaving, nor did he verbally threaten her.

She said she was wearing loose jeans and no belt on the night of the incident. The legs were wider because the jeans were "boot cut" and she did not need a belt because the pants fit her body. She said that before her pants were removed she was facing Respondent, but "by the time that [Respondent] took my pants off, I was facing him at an angle. My head was almost resting on the armrest for the door because he had pulled me towards him." She agreed that while she was holding one of Respondent's hands, Respondent used his other hand to remove her pants.

She stated that the vehicle door was not locked and that she did not have any difficulty leaving. She did not recall saying, "I'm sure he was being nice" to the police. She also did not recall telling Respondent, "Look I have [my] period, this is not a good idea," and "I don't know how far you think you are going to get."

Person A said, "I did not want to have sexual intercourse and I said, stop and no, and continued to go through with it and he penetrated me and that is what I consider rape." She said that she neither felt a firearm in Respondent's jacket while they were dancing together, nor did she see a firearm. She agreed that she might have said she consumed three "Presidentes" instead of two. She did not recall telling Wala that "I'm not a bad girl."

Person A stated that she took Respondent's license plate number down and sent it via text message to one of her best friends as a precaution. She agreed that Respondent acted like a gentleman when they exited the club.

She said it was approximately five minutes "as to the time that it took him to insert himself inside of me," but she did not know how long the actual penetration lasted.

She recalled the hospital results were "something to the effect of not enough DNA."

Upon questioning by the Court, Person A said she had two beers and a third one was ordered but she did not remember drinking it. She also consumed a "shot" and agreed that the alcohol she had consumed did not impair her in any manner. She said, "I didn't want - - I didn't try to get out of the car until it escalated to where it did and once it did, I could not physically remove him off me and get out." She said that on January 27, 2011 she was approximately five feet four inches and 170 or 175 pounds. Person A agreed that she and Respondent both went to the back seat without their jackets on. The bar that they went to did not serve coffee.

Person A said she began verbally telling Respondent to stop when he placed his hands under her shirt the second time.

Daniel Sosa

Sosa, a resident of [REDACTED] was employed by Berkeley College for almost four years. He said Person A is a friend of the family and he has known her for four years. Person A knows Sosa's entire family and Sosa's nephew goes to the school where Person A works, and Sosa was also Person A's personal trainer.

He recalled that on January 27, 2011, at approximately 12:00 a.m. he received a phone call from Person A who sounded like she was crying. Sosa said "[Person A] was trying to talk and she could not get her words out. She asked me to pick her up." Sosa asked Person A her location but Person A did not know "where she was at exactly at," but eventually Person A told Sosa that she would meet him by his house. Sosa said Person A was crying and stuttering and did not want to tell Sosa what had happened. After Sosa calmed Person A down, Person A told Sosa that she had been raped and "something about going to the back seat after they left a club. They were at a bar or whatever and that he raped her in the back seat." Person A also told Sosa that the person who had raped her was a police officer. Sosa said that Wala is his sister and also a police officer.

Sosa testified that while he was with Person A received a phone call, "it was a gentleman on the other line. She put it on the speaker and she was just asking why, why did you do it." Sosa did not clearly remember what the person on the phone was saying.

He said he did not recall whose idea it was to go to the hospital, but he took a taxi cab to [REDACTED] Hospital with Person A. He said while waiting at the hospital, Person A was emotional and still crying, and that he had a spiritual conversation with Person A and told her that everything is going to be all right. He stayed with Person A at the hospital until 7:00 or 8:00 a.m. and did not help her complete any paperwork nor did he speak

with any of the doctors on her behalf. He did not know if anyone else had come to the hospital while he was waiting with Person A.

Sosa left the hospital because he had to take his nephew to school. He said he called Person A once more at approximately 10:00 a.m. or 11:00 a.m. and learned that she was still at the hospital. Sosa said that, within six months after he saw Person A at the hospital, he went to a batting cage with her. He agreed that Person A would bring up her experience of when she was raped and that "she would start crying. She would just start discussing it and I would always -- since I [was not] there, I don't know what happened so I can't say that it did or did not happen." He continued, "I would talk about something spiritual like it is going to be alright, God is in control, He will take care of everything."

During cross-examination, Sosa agreed that he did not have any independent information as to what occurred with Person A that evening. He did not recall hearing "I'm sorry," nor did he recall the conversation between Person A and the other person who was on speaker phone on Person A's phone. He said he did not form an opinion after Person A told him what had happened because "I was not there so I didn't know what happened."

Upon being questioned by the Court, Sosa said that "at first "[Person A] just told me that she was raped and then when we kept talking -- when we kept discussi[ng] it, she gave me a few more details."

Police Officer Rosalia Wala

Wala, a 12-year member of the Department was assigned to Transit District 1 at the time of the incident. She said she has known Person A for three or four years and that Person A is a family friend who comes to family events.

She testified that on January 27, 2011, at approximately 3:00 a.m. or 4:00 a.m., she received a telephone call and when she answered her telephone, she heard Person A crying hysterically. Wala said at first she just listened to Person A cry and tried to understand why she was crying and tried calming Person A down. When Person A finally calmed down, Person A told Wala that she had gone on a date with a police officer who then raped her.

She said that protocol for a rape victim is that the victim first needs to go to the hospital and get treated. Wala wanted to know if Person A had in fact been raped so she asked Person A, "Did he put his penis inside of you and [Person A] said yes. I said, you have to go to the hospital immediately," and recommended [REDACTED]

After Wala got off of the telephone with Person A and after consulting with her [Wala's] husband [a retired police officer] Wala called IAB and told IAB "that my friend called me on the telephone and told me she was raped by a police officer." Wala considered going to the hospital to see Person A but could not because she had to go to work and get her children ready for school. She said she lived almost 65 miles from the hospital. She said she had a conversation with Person A via text messages and wanted to know if Person A was doing okay. Person A told her that she was okay but was not able to speak much. Wala did not recall speaking to Person A after she had left the hospital. Wala next spoke to Person A at the end of March at Wala's daughter's birthday party. While at the party, Person A did not discuss the incident since they were at a family event, but Person A thanked Wala and her family for being there for her.

During cross-examination, Wala was not sure if Person A was under the influence of alcohol and did not remember telling IAB that Person A "sound[ed] a little under the

influence." Wala also did not recall if Person A had said, "I'm not a bad girl."

Respondent's Exhibit [RX] F is the call out interview of Wala on January 28, 2011.

Wala agreed that she made the statements during the call out interview. Wala also agreed that she did not have independent knowledge of the incident. Wala said she did not recall what she had meant when she stated [on the call out interview] about "problems with the cops."

Upon being questioned by the Court, Wala said she was not sure if she had discussed calling IAB with Person A before hanging up the phone call.

Sergeant Shantel James

James, a seven-year member of the Department, was assigned to IAB Group 21 at the time of the incident in question. She has been a sergeant for two years and worked as an investigating officer. She stated that on January 27, 2011, she vouchered evidence.

During *voir dire*, James said she was not present at the hospital when the [Sexual Evidence Collection] (SEC) kit was administered and that she received it from her supervisor, Fabregas. James said she observed the SEC kit in Fabregas' possession while they were both at the command, but did not know "where it went from the hospital to the command." She described the vouchering procedure as collecting the items, listing it in great detail on the voucher, sealing it, writing her name, command and signature, and then delivering it to the appropriate agency. She added that she would complete a voucher for the evidence she collects.

James vouchered one SEC kit and then transported it to the Queens Police Laboratory where she signed and logged it in.

Upon further *voire dire*, James agreed that she physically took the items (on DX 2) and placed them in an “NYPD bag.” James acknowledged that [DX 2] did not indicate if there were any feminine hygiene products listed. Department’s Exhibit (DX) 2 is a Property Clerk Invoice No. R770113. James said she dropped off the property indicated on DX 2 to the same location as the SEC kit.

During cross-examination, James did not recall if Fabregas gave her the property listed on DX 2. James stated that “myself and Lieutenant Fabregas was present at [REDACTED] Hospital. She was given the evidence collection kit, she transported it to the command where it was then given to me.” She agreed that she was not with Fabregas the whole time.

Upon being questioned by the Court, James agreed that, other than the bra, there were no other undergarments listed on the voucher.

Christina Aligibakis

Upon consent by both parties, the following items were received into evidence: DX 3 is the laboratory report from the Office of the Chief Medical Examiner Department of Forensic Biology, dated February 6, 2011 lab no FB11-00606. DX 4 is a laboratory report from the Office of the Chief Medical Examiner Department of Forensic Biology, dated March 14, 2011, lab no. FB11-00606.

Aligibakis is a Criminalist, Level two, in the Forensic Biology Department for the Office of the Chief Medical Examiner. She started working there in November of 2006 and was promoted to Level two in July of 2008. Aligibakis holds a Bachelor of Science

Degree in Psychology from the State University of New York, Stony Brook, and a Master of Science Degree in Forensic Science from Pace University. She did a 400 hour internship at the Nassau County Police Department. She said that the Federal Bureau of Investigations (FBI) requires her to stay up to date with current events and that she receives articles on a monthly basis and also receives “continuing education talks” on almost a monthly basis. Aligibakis belongs to the American Academy of Forensic Science.

Aligibakis said she worked in the Forensic Biology Department, Homicides and Sex crimes. She examines physical evidence for biological material such as blood, semen, and saliva. If these biological materials are present, “It goes on to DNA testing to determine the source, to the exclusion of others. I write reports and testify when necessary.” Aligibakis said, “When we get the sexual assault kit, I look at it to make sure that the markings are the same, the FB number or the forensic biology number is the same on the paperwork that I have in the case file as well as on the sexual assault kit.” She continued, “I make sure that it’s sealed and then upon opening it, I itemize the oral swab, buccal swab, any other swabs that are present. And then continue from there to look for biological material.”

She explained that the swabs are just “cut and sent on. So the oral, vaginal, cervical, perianal swabs are sent on for further testing to confirm whether there’s semen or amylase present. If there’s underwear, we check to see if there’s biological material.” She continued, “if we note stains, we say there’s reddish brown staining or there is white crusty staining...and then look at the underwear under an alternate light source to see fluorescence that could presumptively mean that there is semen present there.” She

agreed that it is a different process when using swabs or clothing. Aligibakis said she has been qualified about 10 or 12 times, in courts of law in all five boroughs, as an expert in forensic biology and DNA testing.

During *voire dire*, she said she had been working for the Office of the Chief Medical Examiner since November 2006. Aligibakis said the courts that she was deemed to be an expert in were all criminal courts. Aligibakis was deemed an expert in forensic biology and DNA testing.

Upon questioning by the Court, Aligibakis said that in this instance, there was no DNA testing done, there was just presumptive testing for semen and amylase. The swabs went on for confirmatory semen testing and the “clothing was just presumptive testing and because there was no indication, it was then not sent on for confirmatory testing.”

On continued direct examination, Aligibakis said she reviewed two laboratory reports for Person A. She said both, the SEC kit and Person A’s clothes (DX 2) were sealed when it was received by her. She said that according to the laboratory reports, the “blood was presumptively found on the vulvar swabs and smear, the vaginal swabs and smear, and the cervical swabs and smear.” She continued, “no semen was found on the underwear, dried secretion swabs 1E1 to 1E2 from L breast, vulvar swabs smear, vaginal swabs and smear, cervical swabs and smear, perianal swabs and smear, and all swabs and smear.” She also said, “no amylase was found on the dried secretion swabs 1E1 to 1E2 from L breast, vaginal swabs and smear, vulvar swabs and smear, and cervical swabs and smear.”

Based on the laboratory report, Aligibakis concluded that there was no semen found, but blood was presumptively found on the above noted items. By “blood

presumptively found" she explained that "first we looked at the swab and noticed a reddish brown stain, and then we did a KM or Kastle-Meyer test to presumptively say that blood could be there. And then we stopped at that point." She said amylase is a component within saliva.

She explained that "dried secretions swab 1E1- 1E2 from left breast" means that "we received the swabs taken from the left breast. I'm not sure - - on the notes, on the instructions that are in the sexual assault kit, they moisten swab and I assume that they swabbed the left breast." She said nothing was found on this particular swab.

She said the difference between a presumptive test and a confirming test is that the former means that there could possibly be blood there, whereas the latter confirms that blood is present.

She stated that based upon the results of DX 4, blood was presumptively found on the blue jeans but no semen was found on the blue jeans, blue bra, white flat sheet, white tank top, white t-shirt and black vest from [REDACTED] Hospital. Aligibakis said she tested an area within the inside crotch of the jeans.

During cross-examination, Aligibakis said that after reviewing both laboratory reports, she could not say from whom the blood came from nor could she say when the blood was placed upon the crotch area. She acknowledged that to a reasonable degree of scientific certainty, she could not discern whether the subject of the reports was raped.

Upon being questioned by the Court, Aligibakis said she could not tell if the blood she had examined was menstrual blood or any other type of blood.

During recross-examination, Aligibakis acknowledged that the underwear was tested for blood but no stains were seen in visible light. She said that fingernail testing

was not done and that "we just itemized that we had received fingernail scrapings" and no further testing was done. Aligibakis explained that "AP negative and AP positive" means that on the clothing items "I saw fluorescents. When I went into the room I looked under an alternate light source and I looked at fluorescents and I circled representative stains." She continued, "and from there I presumptively tested for semen and that's using AP or the ^ alpha-naphthol test," and that no semen was found.

Upon being questioned by the Court, Aligibakis said she had been working in the Sex Crimes Unit since November, 2006. Aligibakis agreed that she looked at the samples both with a "naked eye" and with fluorescent light. She explained that first she looked at all the items with a visual eye and if she noticed any stains on the items, then she would take the items for further testing. "So for blood, we presumptively test using the Kastle-Meyer test. And for semen we presumptively test using the ^ alpha-naphtol test. And those are color changes...so we notice a color change if it's positive."

Respondent's Case

Respondent testified in his own behalf.

Respondent

Respondent, a five-year member of the Department, was assigned to the █ Precinct at the time of the incident. He said his mother, father and one brother were all uniformed members of the service and that his second brother is also a police officer in the Dominican Republic. Prior to becoming a police officer, Respondent also served as an auxiliary police officer for two years.

He testified that on January 27, 2011, he was working from 3:00 p.m. to 11:35 p.m. and was assigned to “clean up the parking lot for emergency vehicles” because it was a very snowy day. After cleaning the area in front of the precinct, he saw “[Person A] right across the street from the command as we were walking past her.” While walking into the precinct, Respondent approached Person A and asked her if she needed help with her vehicle. Person A accepted his help and Respondent shoveled the snow from her parking space so she could go in and out of it. He said there had been a blizzard that day.

Respondent told Person A that he was a police officer and also had a casual conversation with her during which they talked about their friends and family who were police officers. Respondent also told Person A that he worked across the street, his first and last name, and where he was from. They exchanged telephone numbers and agreed to meet at a later date. Respondent picked her up on the same night after he completed his tour of duty. He picked her up across the street from the precinct and took her to the Mofongo Bar. They arrived at the bar a little past midnight and had “two beers and [Person A] testified before that she had three beers and one shot.” They had a casual conversation and danced to “reggaeton” and “it was a lot of touching involved and we were very close together dancing on the dance floor.”

They spent about one hour at the bar and then returned to Respondent’s vehicle where they started to “kiss and touch each other. At that point we were only touching our arms and - - arms and upper torso area, so I started to touch her back as well.” The car heater was on and they both had on their coats. They kissed for about a minute or two and then Respondent, “Drove up the block, approximately a block or two away from that location.”

RX G is a photograph of the location where Respondent's vehicle was parked on the date of the incident. RX H is a profile view of the street where Respondent's vehicle was parked showing the whole block and businesses along the strip. RX I is a closer view of one side of the street in the vicinity of where Respondent's vehicle was parked on the date of the incident.

Respondent acknowledged that the strips of bars, businesses, a 24-hour gas station and a grocery store depicted in RX I were open on the night of the incident. Respondent said there was another vehicle parked about a car length away from his vehicle and was occupied by a male and a female. After arriving at the location, "We began to kiss heavily and we were French kissing. At that point we started touching each other and touch each other's body. We were very close, hugging each other." They then removed their coats. Respondent then exited the driver seat and walked to the back seat of his vehicle, after which, Person A exited the passenger seat and also walked to the back seat. Person A left her coat in the front passenger seat. Respondent's vehicle was a 2006 BMW X5, a compact mid-size SUV.

RX J is an inside view of the rear seat from the passenger's side while facing the driver's side. RX K is a view of the vehicle from the rear seat on the driver's side. RX L is a view of the vehicle from the outside showing the front and back side of the passenger side of the passenger side of the vehicle.

Respondent testified that "Whatever transpired in the front seat continued to happen in the back seat." He acknowledged that while they were engaging in acts of intimacy in the front seat, Person A did not protest in any manner. After they moved to the back seat, Respondent said, "We continued to kiss, we started touching each other all

over the place. Was a lot caressing, hugging each other at the same time and it was a lot of French kissing involved."

Respondent indicated that Person A was sitting with her legs across the back seat. Person A's body was on about a 120 degree angle and she was on her backside with her legs extended. Respondent had his left thigh rested on her leg and his left knee on the floorboard. Respondent said, "she is sitting directly in front of me...we're kissing, we're touching each other. Then that's when she touched my penis for the first time over my clothing that night." Respondent denied bringing Person A's hand to his penis and said Person A touched his penis briefly and then removed her hand. Respondent then touched Person A's breast through her outer garment and Person A "didn't object or say anything." Respondent said, "while this is going on ... she was smiling, she's moaning, making sounds like sexual satisfaction as if she was liking it." He said Person A did not push him away or tell him to stop or kick or push him. Respondent placed his hand underneath her sweater, touched one of her breasts and then he "physically removed one of her breasts where it was completely exposed." At this point Person A still did not tell Respondent to stop nor did she push him away, so Respondent began "caressing it and I begin to kiss around her nipples and also to suck on her nipples." Respondent said that Person A still did not say stop or kick, hit or scratch him. He continued, "I was sucking her breast for a period of time and then once I ceased that, then I moved on to the second one [left breast]. And the same thing that happened with the first one." Respondent then exposed Person A's left breast and he began touching and kissing both breasts at the same time.

Respondent agreed that there was no act on Person A's part that would lead him to believe that she did not want to engage in such level of intimacy. Respondent indicated

that Person A was lying down with both of her breasts exposed and that he began kissing the breasts and started to touch "her vagina over her jeans and her clothing." He said Person A did not push him away or verbally protest his actions. Respondent testified that Person A was moaning and he continued to touch her. There were no tears in Person A's eyes and Respondent did not observe any indication from Person A that Person A was frightened by him. Person A neither pushed or struggled with him. Respondent then started to touch her pants and "bottom area and then we ...unbuttoned her pants, unzipped the jeans and with her assistance...she basically lifted her body up...from the seat and helped me put down her pants." He continued, "there was no other way, due to the fact the dimension of my vehicle is really tight; its small in there. There was no way I could have removed the pants without her assistance. The pants they came down to about her knees, but at that point her underwear was still on." Person A physically lifted her rear, about an inch or two, off the seat and then with one of her hands, she helped Respondent pull down her pants to around her knee area.

Respondent said his right knee was directly between Person A's legs and his left knee is on the floor board and Person A's legs were "up in like a 45-degree angle...and spread open." Person A's legs were near Respondent's chest area to the side and he began touching Person A's vagina area over her undergarment. Person A did not ask Respondent to get off of her nor did she say that she wanted to leave. Respondent agreed that Person A did not indicate by any act that she did not want to "engage in that activity."

While facing Person A, Respondent pulls his pants and underwear down to his knees and that is when "one of her hands, she physically grabbed my penis with no clothing on." Respondent denied having insisted that Person A grab or touch his penis. Respondent

continued touching her vagina area with his finger but over her undergarments, and then Respondent said, "I lifted myself up, my body up. So I got close to her and I held my penis with both of my hands ... I moved her panties to the side and rubbed around her vagina area." He said there was nothing obstructing Person A's view and that Person A was looking directly at him while he was holding his penis and that his penis had made contact with Person A's clitoris.

Respondent explained that during his Department interview he stated that, "I am certain we didn't have a full-blown sex act. However due to the fact that I was rubbing my penis around her vagina area, there is possible that the tip of my penis could have went into the vagina opening."

Respondent testified that there came a point when while he was rubbing his penis around Person A's clitoral area, Person A abruptly stopped. Respondent said at this point his penis was outside her vagina. He said Person A did not scream or say, "I want to go home," or "I'm getting up and going to the front." He acknowledged that Person A did not indicate that she was frightened or that she did not want to engage in such level of intimacy.

Respondent testified that Person A's jeans were fitted and that he was rubbing his penis around her vagina area for about "five to ten seconds." After Person A stopped, "she pulled her legs down, pushed me off, and put her pants up. And at the same time, she easily exited the vehicle." He said the doors were not locked and could not be locked and that even if the doors were locked, they could be opened by pulling the handle on the door. He stated that Person A did not say, "Get off me," and that there were no cries associated with her moans and that her eyes were not closed while she was moaning. [Respondent demonstrated how Person A was moaning].

Respondent testified that after Person A pulled her pants up, she removed her coat from the front seat, put it on and then began walking toward the 24-hour parking garages, strip clubs, bars and restaurants. Respondent said his body did not physically prevent Person A from getting out of the vehicle in anyway and that at no point did she say "Take me home." Respondent then pulled his pants up got in the driver's seat and drove beside her. Respondent said, "What's going on. I was shocked. I'm like, can you explain to me what's going on do you want to tell me anything? She's saying, 'No, nothing happened, don't worry about it, I just need to go.'" Respondent also offered to take her home in his vehicle and to also pay for her taxicab fare and remained at the location until Person A found a taxicab.

Subsequent to the incident, Respondent spoke with Person A on three separate occasions, one telephone conversation and two face-to-face meetings. During one meeting, Person A wanted Respondent to be in her vehicle so she picked him up from the [] precinct, drove around the block, parked and spoke about the incident.

Respondent was not aware that he was being recorded during the meetings, but acknowledged that what he had said during the meetings with Person A was fair, accurate and truthful.

Respondent testified that during the telephone conversation with Person A, Person A just wanted to set up a meeting with him. During the face-to-face meeting, Respondent said Person A was "calm and sound ... [and] acted upset but for the most part she was very calm and normal, like nothing was happening." Respondent said Person A wanted him to "repeat in words and explain to her exactly what happened that night at that location. She

wanted me to apologize to her for what happened.” Respondent did not apologize to her because “we were two adults in the back of the seat engaging in adult conduct.”

During cross-examination, Respondent said he was six feet two inches tall and weighed approximately 190 or 195 pounds. Respondent belonged to Bally’s gym where he sometimes worked out. He did not know the maximum weight that he could bench press but agreed that he is “somewhat” athletic.

Respondent testified that on January 27, 2011, he was expecting a child with his live-in girlfriend. Respondent agreed that he had not told Person A about his pregnant girlfriend.

Respondent said he was assigned to shovel the snow from the parking lot and other areas around the precinct but did not recall how long it took him to clean the areas around the precinct and also did not recall if he went back on patrol after shoveling the snow.

Respondent said he helped out Person A because she needed help and that he had helped out another lady and would also help out another man had they needed his help. Respondent agreed that Person A’s vehicle was not blocking traffic and that he did not know if Person A was trying to move from her parking space to go somewhere.

Respondent said he became attracted to Person A “throughout the night.” Respondent acknowledged that he exchanges his telephone numbers with men and women while on-duty on a regular basis and that he exchanged his telephone number with Person A because Person A said she wanted to meet at a later occasion. Respondent acknowledged that he had a conversation with Person A about coffee and at one point Person A offered to bring him and his partner coffee to their precinct. Respondent said, “We exchanged numbers. She said, we could go out

some day, we can agree on going out. We could either go for coffee or a drink.”

Respondent did not recall asking Person A if he could go over to her apartment.

After storing Person A’s number on his phone, Respondent called her and tried to arrange a date. Respondent said that he and Person A decided that they were going to the Mofongo House [bar]. Respondent was wearing a sweater, jeans and a coat and said, “I believe that I did not have my firearm on me.”

When asked if he was overheard by Person A placing a phone call during which he asked “is somebody searching at the door,” Respondent replied, “That wouldn’t be important because it was nobody searching at the door that night.” Respondent did not recall Person A testifying that he [Respondent] had a conversation with someone on the phone regarding being searched. Respondent also did not recall placing any phone calls while driving to the Mofongo Bar. He said he chose the bar because he usually goes there once a month or sometimes more than once a month.

Respondent denied having been sexually aroused while he was dancing with Person A and did not recall what he was thinking while he was dancing with her. Also, while at the bar, he did not think that he would “attempt to sleep with Person A.” He did not recall whose plan it was to leave the bar.

After reading line five of page 22 of his Official Department interview, Respondent did not recall who had suggested leaving the bar. After leaving the bar, Respondent said, “We both said that we were going to stay for a little longer.” Respondent said the reason why he drove two or three blocks from the bar is because things were getting “hot and heavy” in the car [while they were parked by the bar]. Respondent did not recall who had suggested going to the back seat of his vehicle but

said he went to the back seat because of the “intensity of the relationship we were having.”

Respondent acknowledged that Person A did not tell him that she wanted to have sex with him and said that, “there was no way she couldn’t see.. me holding my penis in my hands. She was clearly seeing what was going on. She didn’t object to anything else as well.” Respondent acknowledged that Person A did not give him verbal permission to rub his penis on her clitoris. Respondent said Person A never mentioned that she was on her menstrual cycle.

Respondent said it did not cross his mind to take Person A back to her residence, or to a hotel room. Respondent acknowledged that Person A did not give him verbal permission to rub her vagina and that he rubbed his hands against Person A’s vagina area for “probably a minute or so,” but denied having placed his fingers inside her vagina. Respondent did not recall Person A either guiding his hands or trying to remove his hands from her vagina area. He said Person A did not verbally ask him to place his mouth on her breast and did not recall if he took Person A’s hand and placed it on his penis. Respondent did not consider putting on a condom because one was not available to him.

Respondent did not recall being nervous about STDs [sexually transmitted diseases] or about impregnating Person A as he rubbed his penis on her vagina. Respondent said, “Well, everything that happened there and then happened in the heat of the moment. So I didn’t have a set mind, oh, that is what I’m going to do, then I’m going to move to this side, I’m going to move to that side.” He continued, “I didn’t have a plan. Everything happened in the heat of the moment and a man can only get as far as a female allows him to.”

Respondent said that the tip of penis could have gone into Person A's vagina opening and explained, "full-blown sex" means "full, intense, actual sex where you actually have penetration." While Respondent was rubbing his penis on Person A's clitoris, Person A abruptly stopped, pushed him to the side, opened the door and exited the vehicle. Respondent understood Person A's actions to mean that she did not want to continue, prompting Respondent to stop.

Respondent testified that he followed her along the street in order to "give her a ride back to her house." He agreed that Person A was having a "good time" until she pushed him away. Respondent said he was shocked when Person A left the vehicle because her actions were "completely opposite of what she was just engaging to in that car few seconds before that happened."

Respondent stated that at some point after the incident, he went to see a doctor for a physical, "but it was just a scheduled physical that I had."

It was stipulated by both parties that during the controlled meeting on January 28, 2011, Person A told Respondent, "I wanted you to stop ... did you stop." Respondent stated that when Person A pulled her pants up and exited the vehicle, it meant that he should stop what he was doing.

Respondent did not recall saying, "I feel bad everyday" during the second meeting on February 4, 2011 [RX E]. After counsel refreshed Respondent's recollection, Respondent said he made that comment because he felt bad because Person A had felt bad. Respondent acknowledged that he said, "The time and the place probably led us to be where we are," and explained that "We're two adults in the back of a car, everything progresses from kissing to body touching her breast to being exposed to her touching my

penis." He continued, "all of this that is going on with this body language, it was both of us because we were both involved at the same time. She's touching my penis, I'm touching her back..." Respondent agreed that Person A did not verbally say she wanted sex but that Person A's behavior led him to "pull out his penis."

Respondent said that on January 27, 2011, he did not recall Person A's last name. Respondent also did not recall Person A's last name during his Official Department interview on April 20, 2011.

Upon questioning by the Court, Respondent stated that he chose Mofongo Bar for their date and that food is served there but he did not consume any food and did not recall if Person A had anything to eat. Respondent also did not recall if he or Person A had taken shots while at the bar. Respondent testified that the incident that occurred while they were in the vehicle was not sex, but rather, "we kissed, we caressed each other, her breast was exposed, she touched my penis, and was the rubbing of the penis." He agreed that "full-blown sex" means full penetration.

FINDINGS AND ANALYSIS

Respondent stands charged herein in that while assigned to the [REDACTED] Precinct, while off-duty, on or about January 27, 2011, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer, did intentionally subject an individual, identity known to the Department, to sexual contact without said individual's consent, in that said Police Officer inserted his penis inside said individual's vagina without said individual's consent.

Evidence adduced at trial established that Person A is a school teacher who resides across the street from the █ Precinct where Respondent worked. Person A and Respondent met earlier on the evening of January 27, 2011 when Person A was cleaning the snow off of her car following a snowstorm where schools were closed. Respondent offered to help Person A shovel the snow and eventually Person A agreed. After a brief conversation, Person A gave Respondent her telephone number. They spoke a few times that evening and agreed that they would meet after Respondent ended his tour about 11:00 p.m.

Respondent picked up Person A in his SUV and they went to Mofongo Bar. Person A testified that she consumed one "shot" of alcohol and two beers while at Mofongo. She also stated that she danced "Reggaeton" music which she described as a cultural dance and she stated that she danced in close proximity to Respondent. Person A said Respondent repeatedly asked her if she was having a good time and she replied that she was.

Person A said about 1:00 a.m., she told Respondent that she needed to go because she had to be at work at 8:40 a.m. Person A said Respondent drove to a deserted, dark dead end area and parked the car. She said that once there she did not object. Person A then described open mouth kissing and conversing with Respondent as he sat in the driver seat and she sat in the front passenger seat of the SUV, a BMW X5. After some time, both of them removed their coats and proceeded to the back of the vehicle. Kissing continued but Person A said the conversation was less, kissing was more and Respondent "became more aggressive with his hands." She described his hands being on the small of her back at one point and under her shirt touching her breast at another point.

Person A testified that Respondent told her to relax and have a good time as he managed to place his hands inside her shirt again and she pulled his hands out. She said

she was no longer having a good time and began to resist Respondent's advances. She began to push her body back, but Respondent continued to place his hands all over her body. Person A said Respondent was moving faster and stronger and she told him to "please stop." At that point, Person A said Respondent took her hand and placed it on his exposed penis. Person A stated that she felt afraid because things were moving faster than she had anticipated. She also said she no longer felt in control. Person A said Respondent continued to kiss her; he placed his hands in her pants and inside her underwear. She said eventually his hand was inside of her.

Person A said she used both of her hands to hold onto Respondent's hand that was inside of her. Respondent then used his free hand to pull her pants down. Person A stated that she repeatedly said to stop. She tried to straighten herself up, but she would sink lower into the back seat. Respondent was pulling her pants down and "laying his body on top of mine." She said that eventually Respondent forced himself inside of her. She could not recall how long but she estimated that it could have been five minutes. She said Respondent moved her panty to the side before penetrating her. Person A said she reached for the door handle a few times without success. Eventually she grabbed the door handle, pulled herself up and jumped out of the car. She is standing outside of the SUV with her jeans below her knees and her panties still on. She pulled up her pants, grabbed her jacket from the front of the vehicle and began to walk toward Broadway to a well lit area and hail a taxicab. She noted it was between 1:30 a.m. to 2:00 a.m. at the time. It was also freezing with snow and ice on the ground. Respondent drove alongside her and asked her to stop walking and talk to him, but she did not stop until she reached a

gas station. She called a taxi, went to her friend Daniel Sosa's house and later went to the hospital.

Respondent in sum and substance testified the same as Person A with respect to going to the bar, dancing and kissing. He agreed that they went to an area where he parked his car, but he disagreed that the location was deserted and dark. He described a location where there were strips of bars, a 24-hour gas station and a grocery store. He also said that there was another vehicle next to them with a male and female inside. Respondent noted that they kissed heavily in the front of the vehicle and then they removed their coats. Respondent said he exited the driver's seat and proceeded to the back of the vehicle and Person A did the same on the passenger side. He noted that the heavy kissing they did in the front was never objected to by Person A. He said the "French kissing" continued in the back of the vehicle. He said they were hugging and caressing each other.

Respondent described how Person A was positioned in the back to the vehicle. He said she was sitting on her rear end with her legs across the back seat at a 120 degree angle. He said he had his thigh rested on her leg and his left knee on the floorboard. He said Person A was seated directly in front of him. He said she touched his penis over his clothing at that time. Respondent denied bringing Person A's hand to his penis. He said they continued kissing and touching each other. Respondent said he touched Person A's breast through her outer garment and she did not object. He also said that she made moans of a sexual nature indicating to him that she was experiencing sexual satisfaction.

Respondent denied at any point that Person A told him to stop, kicked or pushed him away. He said he went under Person A's shirt and removed her right breast so that it was

exposed. He said Person A did not push him away or tell him to stop at this point. He then began to kiss around her nipple. She still did not say stop, kick or scratch him.

Respondent said he repeated the same thing with her left breast without objection from her. Respondent said eventually both of her breasts were exposed and he began to touch and kiss both of them at the same time.

Respondent said there was no indication on Person A's part that she did not want to engage in that level of intimacy. He said she was lying down in the back seat of his car with both of her breasts exposed and Person A did not protest. He began to touch her vagina over her jeans and she did not protest. He did not see fear in Person A's face and she did not have tears in her eyes. He then began to unbutton her jeans and unzip them and he testified that Person A lifted her body up so that he could pull her pants down. He noted that she was still wearing her undergarment. Respondent said at no point did Person A tell him to get off of her or that she wanted to leave.

Respondent testified that eventually he pulled his pants and underwear down to his knees while facing Person A. He stated, "One of her hands, she physically grabbed my penis with no clothing on." Respondent said he lifted himself up and grabbed his penis with both hands. He began to move her panty to the side and rubbed her vagina area for five to ten seconds. Eventually his penis made contact with her clitoris. Once that contact was made, Person A abruptly stopped. Respondent stated, "She pulled her legs down, pushed me off and put her pants up. And at the same time, she easily exited the vehicle." Respondent explained that the vehicle was never locked and Person A could have exited. "She did not scream or say that she wanted to go home." She simply pulled up her pants, removed her coat from the front seat and began walking towards the 24 hour

parking garages, strip clubs, etc. Respondent said he pulled his pants up, got in the driver's seat and drove beside her. He said he was shocked and kept asking her what was going on. Respondent said Person A replied, "No, nothing happened, don't worry about it, I just need to go." Respondent said he offered to drive Person A home in his vehicle, or pay for the taxicab. He said he stayed until she caught a taxi.

Respondent testified that following the incident, he met with Person A on three, separate occasions; one telephone conversation and two face-to face meetings. During the telephone conversation she wanted to set up a face-to-face meeting. At the face to-face meeting, Person A wanted Respondent to get in her car. They parked and she wanted Respondent to repeat in words what happened that night and to also apologize. Respondent said he did not apologize because "we were two adults in the back of the seat engaging in adult conduct." He testified that he had no idea that his conversations were being recorded.

Respondent testified that that he did not have "full blown sex" because there was no full penetration. He explained that Person A's body language made him pull out his penis, but once she abruptly stopped, pushed him to the side, opened the vehicle door and exited, he knew that she no longer wanted to continue.

The Court is faced with a very difficult decision. Respondent is charged with sexual contact without consent, i.e., that he inserted his penis into Person A's vagina without consent. To determine whether this was consensual or not, the circumstances must be reviewed. Respondent and Person A had a first date which began after 11:00 p.m. when he got off of work. They went to a bar where they had drinks without food and danced close to "reggaeton" music. They went to his car where they open mouth kissed each other

without objection. It was obvious from the fact that there was a snow storm and schools were closed that the night must have been bitterly cold with snow and ice on the ground. Yet both Respondent and Person A removed their coats in the front seats of the vehicle and proceeded to the back seat of the vehicle. The seminal question is, why? They were already kissing in the front of the vehicle. What would be the purpose for going into the back? The Court can only conclude to get more comfortable and to continue in a more intimate way, what was taking place in the front without obstruction from their coats, as well as the steering wheel and compartments that separate the two seats in the front from each other.

The next question is how intimate were they intending to get in the back? Respondent testified that Person A was sitting on her rear end with her legs across the back seat. Respondent said he had one leg on Person A's thigh and the other on the floor board as he began to touch and caress Person A's body more intimately. Person A testified that the more she tried to move back from Respondent, the deeper she sank into the back seat. The problem with Person A's account is that if she was in a sitting position, there would be no way for her to slump into the back seat of an SUV. The Court is familiar with the interior seats of a BMW X5. Person A is in a sport utility vehicle, not seated on a plush bed or couch. It seems to the Court that Person A had to place herself into a prone position to be falling downward, but this allowed Respondent to get on top of her.

Another circumstance that is worth noting is that Person A was wearing jeans. Person A testified that she was wearing "loose fitting jeans" with no belt such that Respondent was able to simply pull her jeans down without unbuttoning or unzipping them, yet leaving her underwear up intact. The Court finds this testimony to be

incredible. This Court cannot think of any jeans that a woman would wear on a first date that could be pulled down without unbuttoning or unzipping them. In addition, Person A said her jeans were pulled down, yet her panties were still up. This would require Respondent to gently pull her pants down so that her underwear would remain up. Yet at no point did Person A jump up to resist this.

Respondent on the other hand, said he unbuttoned and unzipped Person A's pants and with her assistance, was able to pull the jeans down. Then he reached into her underwear and fondled her for some time. The Court finds Respondent's account to be the more credible. If Respondent pulled down Person A's loose jeans, her underwear should have been pulled down also to make penetration easier. If the Court is to believe Person A's account, the Court lacks understanding as to why Person A did not jump up at that point when her pants were pulled down without her consent and exit the vehicle.

By all accounts, once she jumped up, pushed Respondent to the side and exited the vehicle, everything stopped. The message to stop was clear to Respondent at that point and he did not force Person A back into the SUV. He let her leave and only followed her in his vehicle and offered to take her home.

It is the belief of the Court that Person A went to the back of the SUV to engage in further consensual sexual contact with Respondent. Person A did not go to the back just to kiss or there would have been no reason to remove her coat. She intended to have more intimate contact with Respondent. In addition, up to this point, there was no need for consent because Respondent did not ask permission to do any of the things that he did that night. He picked the place for the date, he drove his car, he danced close to Person A, he drove to a secluded place and he kissed her with an open mouth and never gained

consent for any of these things. In fact, Person A testified that she did not mind. It appears that the situation was heated and passionate and by the time Person A decided to stop, her pants were down by her ankles and Respondent was ready to penetrate her.

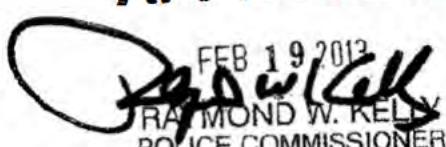
It was at that point that Person A decided to assess the situation that maybe things were going too far for a first date with someone she just met that night. To claim that Respondent inserted his penis into her vagina without consent is not consistent with the evidence. Person A never punched, pushed, kicked, screamed or jumped up prior to her pants being down by her ankles. Person A never scratched or fought with Respondent. Person A testified that she did not feel in control. But quite frankly, she was never in control because Respondent was. He made all the advances and Person A never objected. Had she pushed him off of her or jumped up and exited the vehicle earlier, before her jeans were down, Respondent would have received the message that she wanted to stop. Her physical acquiescence, however, sent a different message. Respondent testified, "We're two adults in the back of a car, everything progresses from kissing to body touching her breast to being exposed to her touching my penis...all of this is going on with this body language, it was both of us because we were both involved at the same time. She's touching my penis, I'm touching her back...." Respondent goes on to say that Person A never verbally said she wanted to have sex but her behavior led him to "pull out his penis." It appears to the Court that when Person A realized she really did not know Respondent, (i.e., whether he was living with someone or in a relationship) that she decided to stop what was happening. It could also be that she realized no protection was being used and that made her decide to stop. Whatever the reason, at the point that Person A jumped up and exited the vehicle, the message was clear that she wanted to stop. Prior to

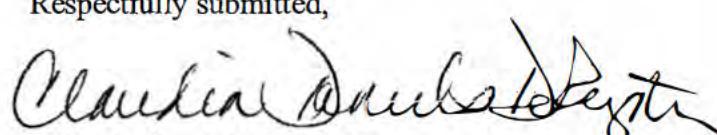
that point, she failed to give physical cues to Respondent that she did not want to continue sexually.

Another circumstance worth mentioning is the results of the laboratory testing done. There was no semen or blood found in the panty tested. Although blood was found in the vaginal area, Person A testified that she was at the end of her menstrual cycle on the incident date. The laboratory could not ascertain whether the vaginal blood was menstrual or from some other source. The Court notes that the possibility of remnants menstrual blood is not evidence that Person A did not intend to engage in sexual activity. In addition, the criminalist, Aligibakis, testified that she could not state with a reasonable degree of scientific certainty that the subject of the reports she examined had been raped.

Moreover, Respondent gave very graphic testimony as to what transpired between himself and Person A was never recalled as a witness to challenge Respondent's account of events.

It is for the reasons enunciated by the Court that Respondent is found Not Guilty.

APPROVED

RAYMOND W. KELLY
POLICE COMMISSIONER

Respectfully submitted,

Claudia Daniels-DePeyster
Assistant Deputy Commissioner-Trials